Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

IVAN KERR

Petitioner

v.

RONNIE COHEN, A/K/A RONALD ALAN COHEN, RONALD ALLEN COHEN, R. ALLAN COHEN,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Georgia in Case No. A01A0941

PETITION FOR WRIT OF CERTIORARI

Arthur J. Shelfer, Jr.
Post Office Box 2295
Thomasville, Georgia 31799
229.226.5551
Counsel for Petitioner

60 pp

QUESTION PRESENTED

Whether dissociation of Georgia Courts from 18 U. S. C. 3664 (l), which provides that a Defendant convicted of a restitution-qualified offense shall be estopped from denying the essentials of that offense in any state civil proceeding brought by a victim, violates the Supremacy Clause of the United States Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CITED AUTHORITIES.....iv

OPINIONS.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT.....3

I. BACKGROUND.....4

II. PROCEEDINGS BELOW.....6

REASONS FOR GRANTING PETITION.....9

CONCLUSION.....13

INDEX TO APPENDICES.....15

APPENDIX A.....1a

APPENDIX B.....3a

APPENDIX C.....8a

APPENDIX D.....10a

APPENDIX E.....15a

APPENDIX F.....17a

APPENDIX G.....31a

APPENDIX H.....35a

APPENDIX I.....36a

APPENDIX J.....37a

APPENDIX K.....38a

APPENDIX L.....39a

TABLE OF CITED AUTHORITIES

Page

Article VI, Clause 2, The Constitution of the United States of America (The Supremacy Clause).....2, 3

Victims and Witness Protection Act of 1982.....8, 10

Title 18 United States Code § 3663 A(a)(2).....3, 9,10

Title 18 United States Code § 3663 A(c)1(A)ii.....3

Title 18 United States Code § 3664(l).....3, 6,7,9

Cases in alphabetical order

Howlett by Howlett v. Rose, 496 U.S. 356 (1990)...12,13

Jones v. Rath Packing Co., 430 U.S. 519 (1977).....12

M'Culloch v. Maryland, 17 U.S. 406 (1819).....11

Poloney et.al v. Tambrands, Inc.
260 Ga. 251 (1991)(Georgia Supreme Court case citing *Jones, supra*).....11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

IVAN KERR, *Petitioner*

v.

RONNIE COHEN, A/K/A RONALD ALAN COHEN, RONALD ALLEN COHEN, R. ALLAN COHEN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Ivan Kerr, Petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Georgia in this case.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals in Kerr v. Cohen is reported at *Kerr v. Cohen,* 249 Ga. App. 392, 397 (2) (548 SE2d 17)(2001)(App., *infra,* 17a).

The underlying criminal case, unreported, is United States District Court, Northern District of Florida, Gainesville Division, Case # 1:98CR19MP.(*infra,* 5, 11) The trial level civil case, unreported except for transcripts, is *Ivan Kerr v. Ronald Cohen et.al.,* Thomas County Civil Action No. 99-CV-1188.

JURISDICTION

The Court of Appeals of Georgia entered its judgment on April 10, 2001 and denied reconsideration on April 26, 2001. (App.H, *infra*, 35a).

The Supreme Court of Georgia denied certiorari on September 7, 2001. (App. I, *infra,*36a*)*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTES

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made,

under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Articles VI, Clause 2, Constitution of the United States of America (The Supremacy Clause).

The Victim and Witness Protection Act of 1982, specifically:

Title 18 United States Code § 3663 A(a)(2) (definition of a victim) see Appendix "J", 37a.

Title 18 United States Code § 3663 A(c)1(A) ii (offenses qualifying for restitution) see Appendix "K",38a.

Title 18 United States Code § 3664 (l) (estoppel of criminal defendant from defense of state court recovery) see Appendix "L",39a.

STATEMENT

A. BACKGROUND

Petitioner, Ivan Kerr, is a victim of an advanced fee money-laundering scheme.

Respondent, Ronald A. Cohen, is a former Thomasville, Georgia attorney, currently incarcerated in Federal Prison for his involvement.

During the 1990's, Cohen and others were involved in a highly-organized scheme which had as its objective the identification and recruitment of clients who needed multi-million dollar amounts of capital for a variety of business projects and investments. Prospective clients were required to transmit fees of from $50,000.00 to $2 million dollars to an attorney or bank escrow account at an "offshore" bank for purposes of application. The funds were to be held in escrow until certain contract terms were met, one of which was that the clients provide the group a bank guarantee, usually 20% of the capital sought, to fund the group's profit. Failure to comply with the funding within a short time period resulted in forfeiture.

In reality, the group did not have access to the funding capital, and their operations were specifically designed to go through the process in order to collect the original advance fee, which was then split among them.

More specifically as to Respondent, he initially became involved as "escrow agent" for the funds and later, as attorney for the "escrow agent," an offshore bank. His membership in the legal profession was specifically calculated to lend credibility to the operation.

In the course of his involvement, Respondent, a member if a four attorney partnership in Thomasville, Georgia, opened an office as "R. Alan Cohen" as opposed to "Ronald A. Cohen" in Coolidge, Georgia, a smaller town some 20 miles from Thomasville.

Petitioner was a "client," or victim of the scheme, and testified at the United States District Court criminal trial of some of those involved.

Respondent was indicted on March 24, 1998 (United States District Court, Northern District of Florida,

Gainesville Division, Case # 1:98CR19MP) for Laundering of Monetary Instruments (Title 18 U.S.C. § 1956), the underlying offense being specified as Fraud by Wire (Title 18 U.S.C. § 1343).

He entered a guilty plea to the charges on January 21, 1999.

He was sentenced on April 25, 2001, i.a., to 121 months in prison subsequent to hearings as to his bond forfeiture and revocation of his Plea and Cooperation Agreement. The United States District Court Judge imposing the sentence found him responsible for all transactions and losses channeled through his Coolidge, Georgia office. Included in these transactions was that of petitioner, Ivan Kerr.

B. PROCEEDINGS BELOW

Long before Respondent's sentencing, Petitioner filed suit against Respondent in Thomas County Georgia,

Superior Court on November 18,1999, a legal and equitable action for fraud, conversion, and to set aside contract, in an attempt to recover his losses.[1]

A Motion for Summary Judgment as to Liability was filed by petitioner on January 25, 2000, based heavily upon Title 18 U.S.C. § 3664(l)

[1] Petitioner's case, Kerr v. Cohen, Thomas County Civil Action No. 99-CV-1188, was but one of three lawsuits filed against Respondent Cohen, which were grounded and have been treated similarly. Austin v. Cohen, Civil Action No. 99-CV-0249 and Herrman v. Cohen, Civil Action No.00-CV-0048 are at this time pending discretionary review by the Supreme Court of Georgia.

"A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim."

Title 18 U.S.C. § 3664(l) (Victim and Witness Protection Act of 1982)

The Motion was denied on March 2, 2000[Appendix "A", *infra,* 1a]. The Order is silent as to the federal law.

Respondent then filed Motion for Summary Judgment on September 25, 2000. Petitioner's response [Appendix "B", *infra,* 3a], not specifically repeating Title 18 USC § 3664(l), relies upon the previous filings before the same judge, and review thereof in accordance with Georgia law of Motion for Summary Judgment.

The Order granting Defendant's Motion [Appendix "C",*infra,* 8a. (mistakenly dated May 12 as opposed to October 12, 2000)], again, is silent as to federal law.

Appeal was filed November 9, 2000. Petitioner's

Brief to the Georgia Court of Appeals [Appendix "D", *infra*, 10a] and, more specifically, Petitioner's Response Brief [Appendix "E", *infra,* 15a] stressed and re-stressed the seemingly controlling federal law, as did the Motion for Reconsideration [Appendix "G", *infra,* 31a], which followed the Court of Appeals decision [Appendix "F", *infra,* 17a], again, ignoring the United States law.

The Motion for Reconsideration was denied [Appendix "H", *infra,* 35a], and the Supreme Court of Georgia declined further review albeit application which was made upon the same principles, on September 7, 2001. [Appendix "I", *infra*, 36a]

ARGUMENT

REASONS FOR GRANTING PETITION

The instant fact situation is simple albeit condensed from a lengthy and intricate scheme: a victim from whom something is taken is entitled to return of its value. This is most basic equity.

United States law provides for this principle, in part via the Victim and Witness Protection of 1982.

"A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim."

Title 18 U.S.C. § 3664(l) (Victim and Witness Protection Act of 1982)

The decisions of Georgia Courts of which review is sought make no mention of the federal law, neither stating conflict with state law nor noting inapplicability to petitioner's sought relief.

Both Laundering of Monetary Instruments (Title 18 U.S.C. § 1956) and the underlying fraud offense (Title 18 U.S.C. § 1343) are "offenses against property under this title, including any offenses committed by fraud or deceit..."Title 18 U.S.C. § 3663 (A)(c) l A)ii.

Petitioner is decidedly a "victim," "...a person directly and proximately harmed as a result of the commission of a scheme, conspiracy, or pattern of criminal activity, any

person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern..." Title 18 U.S.C. § 3663 A(a)(2).

All that is lacking is the application of the United States law by the State of Georgia.

That United States law must be applied and, if conflicting, override state law is well established. The government of the United States, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding." *M'Culloch v. Maryland,* 17 U.S. 406 (1819).

The Supremacy Clause of the United States Constitution dictates that federal law pre-empts inconsistent state law, may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language, usage or implicitly contained in its structure and purpose. *Poloney et. al. v. Tambrands, Inc.* 260 Ga 251(1991)

citing, i.a., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Petitioner here deserves implicitly, at the very least, the protection of the Victim and Witness Protection Act of 1982.

The underlying United States District Court case is not complete. There have been 22 indictments, 15 guilty pleas, two trials of twelve and four weeks in duration, and four guilty verdicts. Two remain fugitives. Assets and proceeds are still being sought. [United States District Court, Northern District of Florida, Gainesville Division, Case # 1:98CR19MP]

The same presiding federal judge found Respondent responsible, at sentencing, for 38 transactions resulting in $6,028,090.00 in losses to victims. [United States District Court, Northern District of Florida, Gainesville Division, Case # 1:98CR19MP]

The Georgia Courts disagree, again, ignoring United States law.

Federal law is enforceable in state courts not

because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum...but because the [US] Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. *Howlett by Howlett v. Rose,* 496 US 356 (1990)

CONCLUSION

The language and logic of *Howlett* are inescapable: An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. 496 U.S. @358.

Such dissociation is obvious here, and review is

warranted and the petition for writ of certiorari should be granted.

Respectfully submitted

Arthur J. Shelfer, Jr.
Counsel for Petitioner
130 Remington Avenue
Thomasville, Georgia
229.226.5551

October Term 2001

INDEX TO APPENDICES

APPENDIX A

(Trial Courts Order denying Petitioners Motion for Summary Judgment)

APPENDIX B

(Petitioners Response Brief to Respondents Motion for Summary Judgment)

APPENDIX C

(Trial Courts Order granting Respondents Motion for Summary Judgment)

APPENDIX D

(Petitioners Appeal Brief to the Georgia Court of Appeals)

APPENDIX E

(Petitioners Response to Respondents Brief to the Georgia Court of Appeals)

APPENDIX F

(Georgia Court of Appeals decision affirming trial Courts grant of Summary Judgment to Respondent)

APPENDIX G

(Petitioners Motion of Reconsideration to the Georgia Court of Appeals)

APPENDIX H

(Georgia Court of Appeals denial of Petitioners Motion for Reconsideration)

APPENDIX I

(Georgia Supreme Courts denial of writ of certiorari)

APPENDIX J

(Title 18 U.S.C. § 3663 A (a) (2))

APPENDIX K

(Title 18 U.S.C. § 3663 A (c) (1) (A) ii)

APPENDIX L

(Title 18 U.S.C. § 3664 (l))

(reprint of court document) *Appendix "A"*

IN THE SUPERIOR COURT

THOMAS COUNTY

STATE OF GEORGIA

Ivan Kerr, *Plaintiff* Civil Action File

v. # 99-CV-1188

Ronald Cohen, a/k/a

Ronald Alan Cohen, Ronald

Allen Cohen, R. Allan Cohen, *Defendant*

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ivan Kerr filed on January 25, 2000 a Motion for Summary Judgment as to liability. This Motion came on regularly for hearing at the Thomas County Courthouse on February 28, 2000. The Plaintiff was represented by Arthur J. Shelfer, Jr. Defendant was present in court accompanied by his attorney, T. Mark Thedieck. It appears that there are genuine issues of material facts to be determined in this case, therefore, the plaintiff's Motion for Summary Judgment as to liability

is OVERRULED AND DENIED at this time.

So ORDERED this 2nd day of March, 2000.

_____

John S. Langford, Senior Judge

Superior Courts, State of Georgia

Sitting by designation in the Superior Court

of Thomas County

Original for filing to:

Honorable David Hutchings, Jr. Clerk, Thomas County Superior Court

(reprint of court document) *Appendix "B"*

IN THE SUPERIOR COURT

COUNTY OF THOMAS

STATE OF GEORGIA

Ivan Kerr, *Petitioner* Case File No:99-CV-1188

v.

Ronnie Cohen, a/k/a Ronald

Alan Cohen, Ronald Allan Cohen,

R. Allan Cohen, *Defendant.*

PLAINITIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiff, Ivan Kerr, requests Judicial Notice of relevant Court records in instant case as well as those relevant in Thomas County Civil Action No. 99-CV-0249 (Austin v. Cohen) and Thomas County Civil Action No. 00-CV-0048 (Herrman v. Cohen), companion cases hereto, pursuant to O.C.G.A. § 24-1-4, 24-5-31, and 24-10-135.

Plaintiff notes further, that single authenticated or certified copies of documents and sealed transcripts have been filed when and where relevant and cross-indexed inasmuch as possible.

As to the documents questioned by Movant in the fourth paragraph of his second brief page, the reference is to documents summarized in United States District Court papers, filed and furnished to Defendant months earlier. See, e.g., United States District Court Affidavit for Cohen Warrant, PP. 246-322, Exhibits to Herrman v. Cohen Motion for Summary Judgment filed August 4, 2000, Cohen's Change of Plea Hearing Transcript, Id., PP 323-355, and documents furnished to Defendant's counsel by Plaintiff's Austin and/or Herrman, Id., PP.153-245, as well as Certificate of Counsel, Id., P. 150.

Cohen attaches to instant Motion an "affidavit" dated August 22, 2000. This presumably, is the "affidavit" referred to in Movant's Motion for More Definite Statement, filed March 15, 2000 (P.2 Brief),

questioned by counsel on May 1, 2000 (Transcript of Hearing, PP. 22-23), (Herrman Summary Judgment Exhibit, PP. 122-124), and discussed by the Court (Id., P 124) which now surfaces some five months later.

Movant, however, previously stated under oath, that he had never contacted Ivan Kerr (Defendant's Answers and Objections to Plaintiff's "Second Request for Admissions," contained in Motion for Protective Order filed April 24, 2000, as quoted in Plaintiff Edward J. Herrman's Brief in Support of Motion for Summary Judgment, filed August 4, 2000).

This should be compared to Movant's testimony in United States District Court, P 26 of transcript, P. 416 Exhibits, Herrman v. Cohen Motion for Summary Judgment filed August 4, 2000, and here incorporated:

(reprint of transcript testimony of Cohen as referenced in Brief)

Q. Did there come a time that you did talk to some individual that you recall?

A. I did talk to a man by the name of Ivan Kerr. I'm

pretty sure that is his correct name.

Q. And did you talk to him?

A. Well, he called me in Thomasville and he was distraught that his time period had run out, they wouldn't extend it. They wouldn't give him back his money, this, that and the other.

And he told me he was going to call the FBI. I said: You can call the FBI, but I don't have any money and I can't give it back to you. And that was about the extent of that conversation.

Q. Had his money, in fact, been deposited, the up front fees that he had, had that money gone through your escrow account?

A. I assumed that it had. He wouldn't have called me had it not.

Q. Do you know how Mr. Kerr found out your number?

(end of reprint of transcript exhibit)

In April, Cohen swore no contact with Kerr. In June, contact is recalled. In August, contact evaporates.

CONCLUSION

For purposes of instant Motion a material fact exists as to which time Mr. Cohen is accurate.

Motion for Summary Judgment should be denied.

Respectfully submitted this 21st. day of September 2000.

Arthur J. Shelfer, Jr.

Attorney for Plaintiff

(reprint of court document) *Appendix "C"*

IN THE SUPERIOR COURT

COUNTY OF THOMAS

STATE OF GEORGIA

Ivan Kerr, *Plaintiff* Civil Action File No:

99-CV-1188

v.

Ronald A. Cohen, et. al., *Defendant*

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant filed a Motion for Summary Judgment in the above case.

This Court finds that the plaintiff had failed to show either conversion, fraud, or contract between the plaintiff Ivan Kerr and the defendant Ronald A. Cohen or R. Allen Cohen. This Court finds no genuine issue as to material facts, and finds that the defendant is therefore entitled to judgment in his favor.

Accordingly, the defendant's Motion for Summary

Judgment is GRANTED on each and every ground and judgment is entered in favor of the defendant as to the claims of Ivan Kerr.

So ORDERED this 12th day of May, 2000.

John S. Langford, Senior Judge
Superior Courts, State of Georgia
Sitting by Designation in the
Superior Court of Thomas County

(reprint of court document) *Appendix "D"*

IN THE COURT OF APPEALS

STATE OF GEORGIA

Ivan Kerr, *Plaintiff* Court of Appeals Docket

v. #A01A0941

Ronnie Cohen, a/k/a

Ronald Alan Cohen, et.al, *Defendant*

STATEMENT OF FACTS

The case before this Court is suit filed, grounded in law and equity, by a victim of a fraudulent advance fee operation against one of the perpetrators of the fraud who the victim was able to identify early on.

It is the second, chronologically, of three such cases filed in Thomas County Superior Court.[1]

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[1] William R. Austin v. Ronald A. Cohen, et.al., Thomas County Civil Action Number 99-CV-0249, filed March 10, 1999, and Court of Appeals Docket Number A01A1071; Kerr v. Cohen, Thomas County Civil Action Number 99-CV-1188, filed November 18, 1999, Court of Appeals Docket Number A01A0941; Herrman v. Cohen, Thomas County Civil Action No: 00-CV-0048, filed January 24, 2000, not yet docketed in Court of Appeals.

The response to the lawsuit was, generally, a denial of culpability, responsibility, and liability by the appellee (R 13), despite his indictment, arrest and subsequent guilty plea in United States District Court (R 26-31), (R 32-65).

A Motion for Summary Judgment was filed by Plaintiff early in the litigation, grounded primarily on United States and Georgia law of restitution and based upon appellee's admission of guilt and appellant's statements under oath as to his victimization (R 17). Upon denial of the Motion, (R 86), appellant commenced discovery in earnest, having responded to earlier discovery requested by appellee.

Defendant's responses to Requests for Admissions, Interrogatories, and Requests for Production of Documents were, in summary, of no use. The Court ordered compliance on May 3, 2000 (R117), at the same time ordering a More Definite Statement from appellant. Appellant complied; appellee did not.

ENUMERATIONS OF ERRORS

I. The trial court abused discretion in failing to enforce its Order Compelling Discovery.

II. The trial court erred in failing to consider the law and evidence in awarding Summary Judgment to Defendant.

ARGUMENT AND CITATION OF AUTHORITY

I. The trial court abused discretion in failing to enforce its Order Compelling Discovery.

The record is replete with Appellant's discovery requests and Appellee's objections and, contrarily, devoid of complaints concerning appellant's responses.

Ultimately, the trial court ordered appellee's compliance, at least in part (R 117).

A "motion to Clarify Court Order and Motion for Extension of Time," filed by appellee (R 145) is all that is forthcoming, is not answered, and discovery still not produced.

Appellant received virtually no information useful in preparation for trial.

II. The trial court erred in failing to consider the law and evidence in awarding Summary Judgment to Defendant.

Review of the entire record in this matter is warranted and urged. O.C.G.A. § 9-11-56 (c); *Lawson v. Duke Oil Co.*, 155 Ga. App.363 (1980), *Sumner v. First Union National Bank*, 200 Ga. App. 729 (1991).

Summary Judgment is an abbreviated trial of no less importance than any other trial on the merits *Davidson Mineral Properties, Inc. v Gifford-Hill and Co.*, 235 Ga. App. 176 (1975). Appellant's challenge in preparing for trial was not adequacy of evidence but avoidance of redundancy. Where a question of credibility arises as to a material issue, Summary Judgment should not be granted *Ash v. Spear*, 137 Ga. App. 12 (1975). One such question here is whether there was contact between appellant and appellee.

Summary Judgment is an extreme remedy and

should be awarded only when truth is quite clear. *Watkins v. Nationwide Mutual Fire Insurance Co.*, 133 Ga. App. 801 (1966).

Attempts to learn the truth through legitimate discovery process here failed; under the circumstances, the truth has been hidden and is therefore, to and extent, unknown.

CONCLUSION

The ruling of the trail court indicates that a jury could not find an individual who admits to fraud could be held liable for damages to one of the victims.

Reversal is warranted.

Respectfully submitted this 26th day of January 2001.

Arthur J. Shelfer, Jr.

Attorney for Appellant

(Reprint from court documents) *Appendix "E"*

IN THE COURT OF APPEALS

STATE OF GEORGIA

Ivan Kerr, *Appellant*

v. Court of Appeals Case No.

A01A0941

Ronnie Cohen, et.al., *Appellee*

APPELLANT'S RESPONSE BRIEF

Title 18 United States Code § 3664, "Procedure for issuance and enforcement of Order of Restitution."

"A conviction of a Defendant for an offense involving the act giving rise to an order of restitution shall estop the Defendant from denying the essential allegations of that offense in any subsequent Federal or **State Civil proceeding** (emphasis added), to the extent consistent with State law, brought by a victim." Title 18 United States Code § 3664 (l).

Title 18 United States Code § 3663 (a) Mandatory Restitution to Victims of Certain Crimes."

Title 18 United States Code § 3663 (A) (c) 1 (A) ii

(in pertinent part) "any offense (A) that is (ii) an offense against property under this title, including any offense committed by fraud or deceit..."

Appellee entered a guilty plea on January 21, 1999 to Title 18 United States Code § 1343, 1856 (h) and § 2.

At no time below does the appellee contradict this statute by either argument or authority, and the concept was not addressed by the Trial Court.

CONCLUSION

Mr. Cohen is guilty by his own admission of fraud under Title 18 United States Code § 1343, 1856 (h), and § 2, and should be judged in any Civil proceeding accordingly. Failure to apply the law is erroneous.

Consideration by this Honorable Court is requested.

Respectfully submitted this 26th day of February 2001.

Arthur J. Shelfer, Jr.

Attorney for Appellant

(Reprint of court document) *Appendix "F"*

SECOND DIVISION

ANDREWS, P.J., ELDRIDGE AND MILLER, J.J.

April 10, 2001

IN THE COURT OF APPEALS OF GEORGIA

A01A0941. KERR v. COHEN. EL-044C

ELDRIDGE, Judge.

On March 24, 1998, appellee-defendant, Ronnie Cohen a/k/a Ronal Allen Cohen, Ronald Cohen, R. Allan Cohen (Cohen"), Robert Ian Newman, Arthur W. Householder, a/k/a Art Householder, Jack Allenbach, Georgia Riger, Earl Ferrell, Orin Utterbach ("Householder"), Jerrell Breslin, David W. Rogers, Robert Petrie, Jessica Jasmin Maun, a/k/a Jessica Santos (Maun"), and Barry Lichtman were indicted upon the charge of conspiracy to conduct financial transactions knowing that the funds involved therein represented the proceeds of wire fraud in violation of 18 U.S.C. § 1343 and knowing that the transactions were carried out with the intent to further and promote such unlawful activity

in violation of 18 U.S.C.§ 1956. Following a hearing on January 21, 1999, the United States District Court for the Northern District of Florida accepted Cohen's plea of guilty to the charge. The case was heard in the district court on June 21 and 22, 2000.

This appeal arises out of the superior court's grant of summary judgment to Cohen, upon a verified complaint, filed on November 18, 1999, by appellant-plaintiff Ivan Kerr averring conversion, fraud, and an action to set aside contract. Cohen timely filed his answer and counterclaim denying the allegations of the complaint and seeking his court costs, attorney fees and damages upon Kerr's claims as false. By separate orders executed on March 6, 2000 and May 5, 2000, respectively, the superior court denied Kerr's motion for summary judgment and granted Cohen's motion for more definite statement of the complaint. One May 18, 2000, Kerr filed his verified amendment to complaint and response to the superior court's order on motion for more definite statement.

Kerr first filed the instant appeal in the Supreme Court of Georgia. The Supreme Court transferred the appeal to this Court because the underlying issues of conversion, fraud, and whether a contract existed between the parties presented questions of law, not equity. See Redfearn v. Huntcliff Homes Ass'n., 271 Ga. 745 (524 SE2d 464) (1999). In the instant appeal, Kerr contends that the superior court erred: (a) in granting Cohen summary judgment since jury questions remain as to each count of his amended complaint, and (b) in failing to enforce its order compelling discovery before ruling upon Cohen's motion for summary judgment. Finding these claims of error to be without merit, we affirm.

1. The superior court did not err in granting Cohen summary judgment as to each of his claims.

On a motion for summary judgment under OCGA § 9-11-56, the moving party may prevail by (1) presenting evidence which negates an essential element of the plaintiff's claims, or (2) showing an

absence of evidence to support the case as to any essential element. *Caven v. Warehouse Home Furnishings Distrib.*, 209 Ga. App. 706 (434 SE2d 532) (1993). If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. OCGA § 9-11-56 (e). *Speir v. Kreiger*, 235 Ga. App. 392, 397 (2) (509 SE2d 684) (1998).

(a) Conversion. At common law actions for trover for conversion related only to tangible things so that an action for conversion as to money would lie only as to "withholding specific bills or coins and does not lie on account of a mere failure to pay money under a contract." *Mack v. Nationwide Mutual Fire Ins. Co.*, 238 Ga. App. 149, 150 (517 SE2d 839) (1999), citing *Faircloth v. A.L. Williams & Assoc.*, 206 Ga. App.764, 766-767 (426 SE2d 601) (1992); *Hodgskin v. Markatron, Inc.*, 185 Ga. App. 750,

751 (l) (365 SE2d 494) (1988). Money other than specific metal or paper representing money is not tangible property.[1] *Mack v. Nationwide Mutual Fire Ins. Co.*, supra at 151. Kerr does not here seek the recovery of specific money to which he had title either in bills or coins. Rather, he seeks to recover a sum of money in the general sense. The record shows that he offered no evidence to the contrary in support of his conversion claim. Because a cause of action for conversion does not lie in the instant circumstances, the superior court did not err in granting Cohen summary judgment on this count. See *Cooke v. Bryant,* 103 Ga. 727, (30 SE 435) (1898) ("Trover lies for the conversion of money, when there is an obligation on the part of the defendant to return specific coin or notes entrusted to [one's] care.' [Cit.]").

[1]Tangible things and monetary value are well distinguished in *Vaughn v. Wright,* 139 Ga. 736 (78 SE 123) (1913).

(b)Fraud. To establish the tort of fraud, Kerr was required to show: (1) a false representation; (2) scienter; (3) intent to induce plaintiff to act or refrain from acting thereon; (4) justifiable reliance by plaintiff; and (5) proximate damage to the plaintiff. *Scarbrough v. Hallam*, 240 GA. App 829, 832 (3) (525 SE2d 377) (1999); *Vester v. Mug A Bug Pest Control, Inc.*, 231 Ga. App. 644,646 (l) (a) (500 SE2d 406) (1998), *Mug A Bug Pest Control v. Vester*, 270 Ga 470 (509 SE2d 925) (1999); *Lister v. Scriver*, 216 Ga. App. 741, 745 (456 SE2d 83) (1995); *Parsells v. Orkin Exterminating Co. Inc.*, 172 Ga. App. 74, 75 (322 SE2d 91) (1984). In response to Cohen's motion for summary judgment, Kerr filed the transcript of his testimony in federal court against Cohen' co-conspirators, having earlier tendered the transcript of Cohen's guilty plea hearing in support of his motion for summary judgment and his amended verified complaint. Pertinently, the evidence shows that in order to

initiate a transaction to obtain venture capital, the co-conspirators required their clients to transmit fees of fifty thousand to two million dollars to an escrow agent at an offshore bank for the purpose of syndicating investors. Such fees were to be held in escrow until clients provided a bank payment guarantee or irrevocable letter of credit guaranteeing their fees. Typically, receipt of this guarantee was required within five to seven days, and failure to provide it resulted in the forfeiture of such fees as had been paid. In reality, the co-conspirators lacked access to the venture capital they held themselves out as having, and they designed their operation with a view to causing clients to forfeit the fees they had paid and divided these among themselves upon an agreed schedule.

In May 1995, Kerr received a letter from co-conspirator Householder offering him venture capital through an organization Householder referred to as the Centurion Group. Kerr responded the following month, indicating that he needed one and a half to two million

dollars to expand his factoring and freight brokerage businesses, businesses he described as very successful, growing rapidly, and worth three to six million dollars. Householder responded, guaranteeing Kerr funding in the amount of five million dollars upon the payment of a retainer fee of $10,000 to the group's escrow agent and an additional five percent charge on the funding he was to provide. Householder also required that Kerr provide his escrow agent a copy of a cahier's check, bank payment guarantee, or irrevocable letter of credit in the amount of his fee.

Kerr paid the $10,000 fee on a second visit to Householder's office. At that time, Householder told Kerr that he had earlier declined to provide Kerr with references, citing a confidentiality agreement with his clients while assuring him that he would nonetheless be comfortable with their names.

In early August of 1995, Householder learned that Kerr was past due on a $150,000 line and operating account at his bank. Later that month, Kerr went to the

bank seeking a letter of credit covering Householder's fees on the transaction. There, Kerr saw a loan officer who refused him saying "It looks like a drug deal." On August 24, 1995, Kerr, through his vice president, wrote Householder seeking a refund of the retainer fee he had paid and withdrew from the transaction. He also stated, however, that he would reapply at a later time. Thereafter, rather than exploring getting a Small Business Administration loan or pursuing other options, Kerr consulted an attorney to assist him in resolving the problem of his past due account at the bank. Kerr's attorney likewise advised him not to further pursue venture capital financing.

On September 26, 1995, Kerr received a memorandum from another investment group. The memorandum, authored by co-conspirator Maun, offered to provide Kerr the venture capital Kerr needed through co-conspirator Newman, a man described as more experienced in syndicating venture capital than Householder. Although his attorney and his banker had

indicated it was not a good idea, Kerr entered into negotiations with Newman for funding, ultimately wiring $100,000 to Cohen as Newman's escrow agent and $13,500 to a Dennis McGregor who was to provide a bank letter of credit backing the $100,000 sent Newman. When the letter of credit was not forthcoming, Kerr paid an insurance company $50,000 and an additional $45,000 to Newman seeking the credit he needed to keep the transaction alive.

Kerr testified that although he was familiar with McGregor's name, he never met him in person. In this regard, Kerr recalled that he was told that McGregor would provide him the bank credit he needed to cover Householder's fees for getting him venture capital. On cross-examination, Kerr testified that he nevertheless wired $100,000 to Cohen upon Newman's representation that McGregor would vouch for him.

Kerr's amended verified complaint showed that in the Spring of 1996, Newman's group advised him that his funds had been forfeited for his failure to obtain the

credit necessary to secure the $100,000 he wired Cohen. Newman demanded the payment of an additional $75,000 in order to proceed with the transaction, a portion of which Kerr paid, but these further efforts to obtain venture capital also failed. Kerr put his losses at "between 250 and $300,000[,]" forcing one of his businesses to go into bankruptcy.

We conclude that the foregoing evidence was sufficient to raise jury questions as to each of the elements of fraud, except that requiring Kerr to show that he justifiably acted, relying upon Cohen's representations or representations made on Cohen's behalf. The evidence showed that plaintiff had ignored warnings by both his banker and lawyer about the nature of the transaction, and there is no evidence that he exercised reasonable care to investigate before paying over such sums. Kerr having failed to come forward with evidence demonstrating a triable issue on this element of fraud, the grant of summary to Cohen was proper on Kerr's fraud claim. *Speir v Kreiger*, supra at

397.

(c) Contract. Cohen supported his motion for summary judgment by his own affidavit wherein he stated, as he had by his counterclaim, "I have never entered into any contract with Mr. Kerr, either oral or written."

A contract is an agreement between two or more parties for the doing or not doing of some specified thing, [OCGA § 13-3-1] and to constitute a valid contract there must be a subject matter upon which it can operate. [OCGA § 13-3-1]. In order that it may allege an agreement a [complaint] must set forth a contract of such certainty and completeness that either party may have a right of action upon it[Cit.].

Peachtree Medical Bldg., Inc., v. Keel, 107 Ga. App. 438, 439-440 (130 SE2d530) (1963). Kerr supports his contract claim by his verified complaint alone. However, inasmuch as Kerr provides no factual basis in support thereof, his complaint is conclusory in this regard and insufficient to avoid summary judgment. See

Harrison v. Harrison, 159 Ga. App 578 (284 SE2d 83) (1981) ("Verified pleadings have been held to be equivalent to a supporting or opposing affidavit for purposes of raising an issue of fact on summary judgment.[Cit.]"); see also *Vanacore v. Citizens Bank*, 228 Ga. App. 87, 88 (491 SE2d 181) (1997) ("Where no factual basis is provided for an averment appearing in an affidavit, it may be deemed conclusory and will not be sufficient to avoid summary judgment. [Cit.]"). Having failed to show this fundamental requisite to an enforceable contract by his complaint or in response to Cohen's motion for summary judgment, the superior court did not err in granting Cohen summary judgment on Kerr's contract claim. OCGA § 13-3-1; *Speir v. Kreiger*, supra at 397. At best, Kerr established only his efforts at contract formation but never established a contract with definite essential terms, whether express or implied, i.e., the nature of the capital contribution, form of the contribution, when contribution would be made and by whom as well as the role of the defendant.

Even if the superior court erred in rendering its order on Cohen's summary judgment motion without enforcing its order compelling discovery (and we find no error), such error would have been harmless. The materials sought – a copy of Cohen's petition for voluntary disbarment, a copy of all responses from the Georgia Bar, including Cohen's disbarment, a list of Cohen's victims, his co-conspirators, his aliases, his social security number, income and real estate information, and a listing of persons to whom Cohen transferred in excess of $100 since May 1997- were immaterial under the circumstances of this case. *Kramer v. Kroger Co.*, 243 Ga. App. 883, 889 (4) (534SE2d 446) (2000).

Judgment affirmed. Andrews, P.J. and Miller, J., concur.

IN THE COURT OF APPEALS *Appendix "G"*

STATE OF GEORGIA

Court of Appeals Case No. A01A0941

Ivan Kerr, *Appellant,*

v.

Ronnie Cohen, et.al., *Appellee.*

MOTION FOR RECONSIDERATION

Comes now Ivan Kerr and, pursuant to Rule 37 of the Rules of the Court of Appeals of the State of Georgia, brings this his Motion for Reconsideration regarding this Court's opinion in the above-captioned case, affirming the trial court's decision in the matter.

BASIS FOR GRANTING MOTION FOR RECONSIDERATION

Pursuant to Rule 37 (e) of the Rules of the Court of Appeals of the State of Georgia, Appellant respectfully submits that this Court, in rendering it's opinion affirming the decision of the trial court,

(1) has overlooked controlling United States law, to wit:

" A conviction of a Defendant for an offense involving the act giving rise to an order of restitution shall estop the Defendant from denying the essential allegations of that offense in any subsequent Federal Civil proceeding or **State Civil proceeding** (emphasis added), to the extent consistent with State law, brought by the victim." Title 18, United States Code § 3664 (l), (R 21, Appellant's Response Brief). (2) has overlooked material facts of record: (a) documentation of Appellant Kerr's contacts with Cohen et.al., was not available at the time of the Motion and Order appealed from, which would show the justifiable reliance on the representations of appellee by appellant. (R 173), (R 196). (b) considerable documentation was reviewed in the United States

District Court file and summarized, not as evidence, but as examples of available evidence, by counsel. (R123-131), specifically R 130). (c) appellee admits during testimony in United States District Court to a telephone conversation with appellant. (R 157) yet denies any conversations in instant Motion (R 170) and an affidavit (R 175). (d) appellant's testimony alone took two days (this Court's opinion, P2 Line2) of an approximate eight week trial. (e) appellant, under oath, explains the lack of viability of a Small Business Administration loan (R 231, 232). (f) appellant, under oath, testifies as to a contract with co-conspirator Householder (R 243, Lines 1-3). (g) appellant dealt with "a number of attorneys." One advised against the transaction. "R. Allen Cohen" recommended it. (h) appellant explains for consideration by the federal jury his justifiable reliance on the bona fides of the scheme.

(R 255).

Appellant respectfully requests that this Court inquire into and reconsider its opinion affirming the trial courts decision.

Respectfully submitted this 18th day of April, 2001.

Arthur J. Shelfer, Jr.

Attorney for Appellant

Appendix "H"

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, APRIL 26, 2001

The Court of Appeals hereby passes the following order:

Case No. A01A0941

IVAN KERR V. RONNIE COHEN

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

(Date stamped April 26, 2001)

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written. Clerk (signature followed)

Appendix "I"

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 7, 2001

Arthur J. Shelfer, Jr.

POB 2295

Thomasville, GA 31799-2295

CASE NO: S01C1261

Ivan Kerr v. Ronnie Cohen

COURT OF APPEALS CASE NO: A01A0941

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur

Sherie M. Welch, Clerk

APPENDIX J

(Pertinent text of Title 18 U.S.C. § 3663 A (a)(2)

"For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, and any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."

APPENDIX K

(Pertinent text of Title 18 U.S.C.§ 3663 (A)(c)1 (A)ii)

"This section shall apply to all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense…

"That is …

"an offense against property under this title, including any offense committed by fraud or deceit…"

APPENDIX L

(Pertinent text of Title 18 U.S.C.§ 3664 (l)

"A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim."